United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL
WITH PROOF
OF SERVICE

75-1284

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P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH BONACORSA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING IN BANC

Preliminary Statement

Appellant Joseph Bonacorsa respectfully petitions for rehearing, and suggests rehearing in banc, of the decision of this Court (Moore, Feinberg and Van Graafeiland, J.J.) filed January 9, 1976, affirming his conviction of one count of making a false declaration to a grand jury (18 U.S.C. § 1623), and one count of obstruction of justice (18 U.S.C. § 1503).

Reasons for Granting Rehearing

While appellant wishes to reserve his argued position as to each of the points of appeal, this petition is specifically addressed to the following issues which we believe have been incorrectly decided.

I

In affirming appellant's conviction under the perjury count of the indictment, the Court held that even if some of the questions set forth in the indictment were ambiguous, appellant's motion directed against the entire perjury count was insufficient to preserve the error for appellate review:

> Because of appellant's failure to move for the withdrawl of the allegedly ambiguous questions and answers as possible assignments of perjury or in some equivalent manner to focus the attention of the trial court on their asserted infirmities, the

> error allegedly resulting from their submission has not been preserved for review. [United States v. Natelli, __F.2d__ (2d Cir. July 28, 1975) slip op. 5165; rev'd in part on rehearing, __F.2d__ (October 6, 1975), slip op. 6297; original opinion reinstated in all respects on second rehearing, __F.2d__ (December 4, 1975), slip op. 913.]

(Slip. Op. at 1458) (emphasis added).

Except through clairvoyance, appellant's trial counsel could not possibly have made the motion the Court now requires.

In United States v. Natelli, supra, a single count alleged two separate specifications of making false statements in a proxy statement in violation of 15 U.S.C. § 78ff(a). Each specification was set forth in a separately numbered paragraph, and each paragraph contained a clear explanation as to how the statements were alleged to be false. Accordingly, the defendants in Natelli had a clear opportunity to make a specific motion addressed to a particular specification. (Which is precisely what one of the defendants did).

However in the present case, the single perjury count merely sets forth 26 questions and answers excerpted from appellant's grand jury testimony, all of which are alleged to be false. The testimony is not broken down into specific assignments of perjury, nor are reasons provided as to how particular statements are alleged to be false.

It was not until the government's closing argument that the prosecutor claimed the perjury count contained nine separate "lies", set forth his theory as to each, and

argued that

> This is not a question of which lie was told in different Counts. All the Grand Jury minutes are in one Count. If there is any lie, if you find any lie in there that you found the defendant to have made and to have made falsely, it is your duty to find him Guilty. (A-169)*

Under the circumstances, appellant was not in a position, either at the close of the government's case or at the close of all the evidence, to make a motion addressed to as yet undisclosed specifications. This was simply an impossibility.

What appellant's counsel did do, however, and what was clearly all that could be done under the circumstances, was (1) to interrupt the government's summation and object to the prosecutor's argument concerning separate "lies" for which there was no evidentiary basis, and which had not been specifically charged in the indictment (A-478, 488), and (2) to thereafter move for a mistrial. (Tr. 509-511; 512-524).

Even after this motion was denied, counsel continued to press the point, and emphasized one of the particularly objectionable assignments of perjury urged by the prosecutor.**

> MR. CASTELLANO: I don't agree. I'll go further and point out other instances.
>
> On page four hundred seventy line twelve, he says "How many times did you deal with him, just one time--who is this Mr. Rubin, just one time--yes--and this is for the horse Jolly/Timmie one time--well, you heard it right there, here's another lie you could find."
>
> There is no place in the indictment that he's charged with lying, that he said that it was just one time reference to the horse Jolly/Timmie.
>
> "How many times--twice--he was paid twice in two installments."

---

*The trial court gave the jury an instruction consistent with this statement. (See Slip Op. at 1457 n. 7).

**This particular assignment of perjury, about which Judge Feinberg questioned government counsel at oral argument, is discussed infra at p. 8.

He's telling the Jury that the perjury has reference to the two payments, not that he only negotiated once. I'll make my record, if I may. (Tr. 516)

Thus, even if the so-called Mascuch-Goldstein rule (United States v. Mascuch, 111 F. 2d 602 [2d Cir.], cert. denied, 311 U.S. 640 [1940]; United States v. Goldstein, 168 F. 2d 666 [2d Cir. 1948]), requiring a specific objection to particular assignments of perjury in a single count, does have continued vitality following the Supreme Court's decision in Yates v. United States, 354 U.S. 298 (1957), it clearly is inapplicable here where the circumstances precluded such a motion.

Moreover, appellant's counsel certainly did "focus the attention of the trial court" on the problem, and made a most deliberate effort to protect the record. Here, as in Natelli, it cannot fairly be said that appellant did not a least "satisfy the spirit of the Mascuch-Goldstein rule." United States v. Natelli, supra, at 918.

II

In affirming appellant's conviction, the Court has apparently held that none of the nine assignments of perjury argued by the prosecutor in closing argument were insufficient because of imprecision or ambiguity. This determination is in clear conflict with United States v. Bronston, 490 U.S. 352, 362 (1973) ("Precise questioning is imperative as a predicate for the offense of perjury") and virtually every modern case that has considered the subject. See, e.g., United States v. Bronston, 453 F.2d 555, 560 (2d Cir. 1971) (Lumbard, J., dissenting), rev'd, 490 490 U.S. 352 (1973); United States v. Wall, 371 F.2d 398 (6th Cir. 1967); Galanos v. United States, 49 F.2d 898 (6th Cir. 1931)

The prosecutor argued that the following testimony constituted five separate assignments of perjury:

(1) Q. What about the fifth horse [Joli Timmy]?

A. I didn't want to hold any money. The

fifth horse I bought outright* and I believe I remember the name of the people was Ruben. Steve Ruben.

(2) Q. And anybody else?

A. I think he had a partner but I dealt with Steve because he was a trainer and so on and so forth and I got a bill of sale from him for the amount that I purchased the horse for and also we paid the City sales tax to the tax people for the amount of the horse.

(3) Q. You dealt with him directly?

A. Yes.

(4) Q. How did you pay him, with a check or cash?

A. No cash.

(5) Q. Do you remember approximately when this was?

A. It was in February sometime, Hal. I don't know the exact date right offhand.

(6) Q. How many times did you deal with him, just that one time?

A. With who is this?

(7) Q. Mr. Ruben.

A. Just the one time, Yes.

(8) Q. And this is for the horse Joli Timmy? Is that correct?

A. Right.

While the ambiguity of all five assignments is discussed in our brief (App. Br. pp. 14-18), here we will examine two of the questions, which were emphasized at oral argument of this appeal.** But first

---

* Four other horses, which had just been discussed, were "claimed" rather than "bought outright."

** It is of course correct, as the Court notes (Slip Op. at 1456), that statements cannot be lifted from their context in order to establish a defense to perjury. On the other hand, where responses to particular questions are alleged to be separate and independent assignments of perjury, as they were here, the legal sufficiency of each such assignment must be independently examined.

we must briefly review the essential facts.

It was established at trial, and uncontested by appellant, that in February, 1973, Forrest Gerry delivered a cash payment to Steve Rubin towards the purchase of a horse called Joli Timmy. It was also undisputed that this horse, together with its registration papers, and later a bill of sale, were delivered by Steve Rubin (who was the prior owners' trainer) directly to appellant. The horse was officially registered in appellant's wife's name, and was trained and raced by appellant for several months following the sale.

The controversy was that the government claimed that Forrest Gerry had purchased Joli Timmy for himself and become a "hidden owner," while appellant contended that Gerry merely delivered appellant's money to Rubin as a favor, and was certainly not owner of the horse.

The prosecutor argued that the response "No cash" to the question "How did you pay him, with a check or cash?" was perjurious because the payment, which was in cash, was made by Forrest Gerry and not by appellant.

> "Question: How did you pay, in cash or check?
>
> "Answer: No, cash."
>
> Paid in cash. Forrest Gerry paid him in cash. Four [i.e., the forth of "nine lies" which the prosecutor was enumerating].

(Government's Summation, A-191).

But clearly, the question asked was not who made the payment, but the form of the payment. Moreover, the question as asked was susceptible to only two responses--a check or cash--and under the prosecutor's theory, either response would have been perjurious!

Certainly such a question cannot be the basis of a perjury conviction.*

The response "Just the one time, Yes" to the question "How many times did you deal with him, just that one time?" was claimed to be perjurious not because appellant had dealt with Mr. Rubin more than one time, or concerning any horse other than Joli Timmy, but because the payment for Joli Timmy was made in two installments. Under what possible interpretation of the wording of that question the prosecutor formulated that theory is truly beyond our comprehension. But nevertheless, that was his theory:

> --how many times did you deal with him, just that one time--and who is this Mr. Rubin--just one time yes.
>
> And this is for the horse Jolly Timmy--one time.
>
> Well you heard right there, here's another lie you could find.
>
> How many times--twice--was paid twice in two installments.

(Government's Summation, A-176).

If questions such as these are not "fundamentally ambiguous," than that term is meaningless. If questions such as these--where the questioner suggests answers which he believes to be false--are not considered "unfair" and condemned as unlawful baiting of a witness to commit perjury, than the grand jury is a more abusive

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* For a similar, but less blatant example of such a question in a perjury prosecution, see United States v. Cook, 497 F.2d 753,768 (9th Cir. 1972) (Ely, J., dissenting), modified on basis of dissenting opinion, 489 F.2d 286 (9th Cir. 1973).

instrument than even its severest critics allege.*

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* An additional consideration relevant to the fairness of the questioning of appellant is the fact that at the time the prosecutor asked the above questions, he had already decided to seek an indictment against appellant based upon appellant's denial of Forrest Gerry's alleged hidden ownership of Joli Timmy., and had sought formal authorization from the Department of Justice in Washington. Appellant was not informed of this prior to testifying, and in fact, both he and his attorney submitted affidavits following trial claiming they were misled into believing appellant was not going to be indicted. (A-259,281). Moreover, on the date appellant gave the above testimony (December 17, 1973), and the date he adopted it before the grand jury (December 19, 1973) he was not fully advised of his constitutional rights--he was not informed that anything he said could be used against him. (This warning was given to the defendants in United States v. Corallo, 413 F.2d 1306 (2d Cir.), cert. denied, 396 U.S. 958 (1969) relied upon by the Court. (Slip. Op.at 1460)).

Also significant is that although it is certainly correct that the "grand jury was attempting to ascertain whether appellant was fronting for Gerry in the purchase and alleged ownership of Joli Timmy" (Slip Op. at 1456-1457), appellant was never informed of this fact, nor was he ever asked a single question which even mentioned both Forrest Gerry and Joli Timmy. The only questions appellant was asked about Joli Timmy, in the course of three grand jury appearances and a deposition, are those set forth above.

Furthermore, even if appellant had been aware of the precise subject matter of interest to the grand jury, he had no obligation to volunteer facts. It was the prosecutor's burden, if he wished to use the perjury sanction, to ask the right questions, and to do so in a plain and unambiguous manner. United States v. Bronston, supra, at 360. And this he clearly did not do.

III

The variance argument advanced by appellant has apparently been misconstrued.

Counts 2 and 3 of the indictment allege that appellant corruptly endeavored to influence the testimony of Steve Rubin in violation of 18 U.S.C. § 1503. The two counts, which essentially recite the language of the statute, are identical except that count 2 alleges an offense occurring "On or about the last week in February, 1973" and count 3 alleges a separate offense "On or about the month of September, 1973."

As the Court notes (Slip Op. at 1458-59), and as the grand jury testimony of Steve Rubin indicates, count 2 is based upon an alleged statement made by appellant to Rubin in February, 1973 when they met and Rubin gave appellant a bill of sale for Joli Timmy. Count 3 is based upon another statement of appellant allegedly made in September, 1973 when he and Rubin accidentally met on the track at the raceway. (See Appellant's Brief, pp. 25-27).

At trial, as before the grand jury, the sole source of evidence of these alleged statements of appellant was Steve Rubin. However, at trial Rubin testified that the first obstruction of justice--the bill of sale incident alleged in Court 2--occurred in September rather than in February.

This change of 7 months in the date of the alleged offense constituted a material variance between pleading and proof. The net effect was an impermissible amendment of Count 2, so as to change

the date from February to September. It is neither possible nor necessary to determine if the grand jury would have indicted appellant for this new offense (i.e., whether Rubin's trial testimony concerning the date of the bill of sale incident would have been inconsistent with other evidence that was before the grand jury). The mere fact that appellant's conviction may be based upon this evidence, for which there was no indictment, is sufficient to vitiate the verdict. Stirone v. United States, 361 U.S. 212, 217 (1960); Russel v. United States, 369 U.S. 749, 770-771 (1962).

The fact that appellant was also indicted for another, separate offense in Count 3, which coincidentally occurred in September, is not curative. If anything, it merely compounds the error by producing an improper amendment of Count 3 also, thereby rendering it duplicitous. (i.e., it is impossible to determine which offense the guilty verdict as to count 3 is based upon--the offense actually charged by the grand jury, or the offense for which the grand jury returned Count 2).

This fundamental defect in appellant's trial cannot be dismissed as mere "proof of more wrongdoing than was originally thought occurred in September" (Slip Op. at 1459). For this "proof" constituted a separate offense for which appellant could be tried and convicted only if first indicted. The Court's determination of this issue virtually repeals the Fifth Amendment prohibition that

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .

While a time variance as great as 7 months is probably sufficient to vitiate a verdict without a specific showing of prejudice, see United States v. Figurell, 462 F.2d 1080, 1082 n.5 (3d Cir. 1972), this particular variance was extremely prejudicial. For as discussed in our brief (App. Br., p.28), while it would have been virtually impossible for the government to establish that appellant knew Steve Rubin was a potential grand jury witness in February, 1973, that was no longer the case in September, when appellant had himself been subpoenaed before the grand jury, and the harness racing investigation had greatly intensified.

Appellant's "substantial rights" were clearly affected by this variance, and the conviction must be reversed. Berger v. United States, 295 U.S. 78 (1934); Stirone v. United States, 361 U.S. 212 (1960); United States v D'Anna, 450 F.2d 1201 (2d Cir. 1971).

Conclusion

For the foregoing reasons, this petition should be granted, and appellant's conviction reversed.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th RD MASPETH, N.Y.

That on the 23rd day of JANUARY, 1976, deponent personally served the within PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

HON. DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
ATTORNEY FOR APPELLEE
225 CADMAN PLAZA EAST
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Robert La Grassa

Sworn to before me this
23rd day of January, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978